LAURA SOUCIE SCHLIEP, Appellant	:	Order Affirming Decision
v.	:	Docket No. IBIA 96-56-A
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	November 24, 1997

Appellant Laura Soucie Schliep seeks review of a February 2, 1996, decision issued by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA). The Area Director concluded that he lacked authority to issue an allotment to Appellant from tribal lands on the reservation of the Confederated Salish and Kootenai Tribes of the Flathead Nation (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

The relevant legal background to this matter is not disputed. The first allotments on the Flathead Reservation were made pursuant to the Act of April 23, 1904, 33 Stat. 302, which directed the Secretary of the Interior (Secretary) to survey the reservation, to make allotments to all tribal members, and to appraise and sell any remaining lands, with the proceeds to be used for the benefit of the tribal members. The Acts of May 25, 1918, 40 Stat. 591 (1918 Act), and June 30, 1919, 41 Stat. 9 (1919 Act), authorized the Secretary to make a final membership roll of, inter alia, the Indians of the Flathead Reservation and to distribute tribal trust funds per capita to the persons on that roll. In the Act of February 25, 1920, 41 Stat. 452 (1920 Act), Congress authorized the Secretary, for one year, to make new allotments from unallotted or unsold lands on the Reservation to all unallotted, living children who were enrolled or entitled to enrollment. On February 11, 1922, the Secretary approved an allotment schedule made pursuant to the 1920 Act. In the Act of May 31, 1924, 43 Stat. 246, Congress provided for the addition of 16 individuals to the final membership roll and for their receipt of a per capita payment, but did not authorize allotments for these persons. The Act of March 3, 1933, 47 Stat. 1753 (1933 Act), authorized the Secretary to add to the final membership roll the names of 11 more individuals, including present Appellant; to pay each of those individuals a sum equal to that paid per capita to those on the final roll; and, with one exception not relevant to this decision, to allot land to these individuals "from any available tribal unallotted lands of the Flathead Reservation." On June 18, 1934, the Indian Reorganization Act (IRA) was passed. The IRA provided that "no land of any Indian reservation * * * shall be allotted in severalty to any Indian." 25 U.S.C. § 461 (1994). 1/

1/ All further citations to the United States Code are to the 1994 edition.

Relevant factual matters are also not in dispute. Appellant, who was born on December 16, 1914, was alive and living on the Flathead Reservation when the final membership roll was completed pursuant to the 1918 and 1919 Acts. She was identified to BIA by her mother, but was not included on the final membership roll. By letter dated December 21, 1927, the Flathead Superintendent acknowledged Appellant's omission from the final roll, stating that there was, at that time, no indication as to why she had not been included. The 1933 Act was passed to provide for Appellant and ten other individuals who had been omitted from the final membership roll. By letter dated July 15, 1933, the Assistant Commissioner of Indian Affairs instructed the Flathead Superintendent to

> enter the names of the * * * children on the rolls of the Flathead Indian Reservation. All are to be given full tribal rights * * *. You will have these children or their guardians (natural) make selections of available tribal lands and submit their allotments to this Office on a schedule in the usual manner.

However, by letter dated July 6, 1934, the Commissioner of Indian Affairs notified the Flathead Superintendent that "[t]he [IRA] prohibits the making of any further allotments. Accordingly, previous instructions on this matter are hereby revoked and you should not submit any schedule of the allotments in this case."

Appellant received a per capita payment under the 1933 Act, but did not receive an allotment. Although the administrative record contains rather extensive materials from the National Archives, nothing indicates that an allotment selection was made by or for Appellant prior to the enactment of the IRA. There is also no evidence as to why no selection was made.

Appellant applied for an allotment by an undated note addressed to the Tribal Council and Land Committee. Appellant's note states in its entirety: "I would like to apply for this section of land [described] as NW4 SW4, N2 SW4, SE4 SW4 SW4, E2 SW4, SW4, in sec. 35-21-20, Approx 75 acres. Or This 80 acres [described] as E2 NW4, in sec. 24-1920." Based on the fact that no party to this proceeding has argued otherwise, the Board assumes that the lands selected by Appellant are tribal lands located on the Flathead Reservation.

At page 1 of his February 2, 1996, decision, the Area Director stated:

> Because no selection of land was made for [Appellant] prior to the IRA, I cannot now allow such a selection to be made or a trust patent to be issued. The only allotments issued after the IRA on the Flathead Reservation were for allotment selections made and entered on an allotment schedule approved February 11, 1922. Although trust patents for these allotments were issued after the IRA, the selections had been made many years prior to the IRA, and thus were not encompassed within its prohibition against further allotments.
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> In addition, it is my understanding that "available tribal unallotted land" does not exist on the Flathead Reservation at

this time. However, under the tribal constitution the Tribal Council has authority to issue assignments of tribal land. We suggest that you contact the Council to see if any land is available for an assignment.

The Area Director based his decision in part on a January 31, 1996, memorandum from the Office of the Regional Solicitor, Pacific Northwest Region (1996 Memorandum). The 1996 Memorandum, which was in turn based on information obtained from the National Archives, states at pages 2-5:

> In 1936 the Indian Office in Washington, D.C. considered the matter of those ten individuals who were to have received allotments under the 1933 Act. At first, the Director of Lands summarily concluded that the IRA superseded the 1933 Act. Later, the Division was instructed to determine if selections had been made prior to the IRA because a Solicitor's Opinion, dated July 17, 1935, 55 I.D. 295, had indicated that it may be proper to process allotments for which selections had been made prior to the IRA. By letter dated June 19, 1936, the Superintendent informed the Commissioner that no allotment selections were on file at the Agency for any of the individuals who were to receive an allotment under the 1933 Act. After learning this fact, the Department took the position that these ten individuals were no longer able to make an allotment selection or receive a trust patent to land. This position was expressed in a letter to Senator Wheeler, dated May 6, 1942, in response to an inquiry on behalf of one individual named in the 1933 Act. The letter also suggested that the individual might want to contact the Tribe about receiving an assignment of tribal land.
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> The position taken by the Department in 1942 is consistent with the law regarding the issuance of allotments. The Solicitor's Opinion referenced above contains a detailed analysis of the allotment process and a discussion of when and under what circumstances a legal right to an allotment may arise. It also discusses the intent of the IRA's prohibition against further "allotment" and concludes that it was intended to prohibit the process by which a right of occupancy is assigned to an individual Indian. That assignment could arise long before a patent was issued if the applicable allotment law made the approval and issuance of a patent mandatory after certain conditions existed. Thus,
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> > the natural and reasonable interpretation of the [IRA] is that the act prohibits the further subdivision and assignment of tribal and surplus lands among unallotted Indians under any statute, but that it does not forbid the patenting of approved allotments nor the approval at least of those allotment selections which under the particular allotment act are equitably vested in the allottee. [I Op. Sol. on Indian Affairs at 569, 55 Interior Dec. at 300.]

The 1935 Opinion applied this interpretation to a specific question about allotments on the Fort Belknap Reservation. Congress had provided that the entire reservation was to be allotted pro rata among the members of the tribe. At the time the IRA was enacted, 25 allotment selections had been made and included in a schedule but not patented. The Solicitor was asked whether the IRA prevented the Secretary from completing the allotment process and issuing the patents for those 25 selections. The Opinion concluded that the allotment law applicable to Fort Belknap must be interpreted to grant a right to an allotment once the Indian made a selection of land. Important to the Solicitor's conclusion was the fact that the entire reservation was to be allotted, and that therefore, each member of the tribe was entitled to an allotment at the time the pro rata share was determined. Moreover, the failure to complete the allotment process was due to no fault of the Indians involved. Thus, the IRA did not prevent the Secretary from completing the allotment process by patenting the land.

Pursuant to this long standing interpretation, the fact that a selection for [Appellant] had not been made at the time the IRA became law prevents her from making a selection and receiving a trust patent now. While in 1933 Congress clearly intended that she should receive an allotment as her fellow members had, by June of 1934, Congress had changed its position and established a policy preventing further subdivision of tribal lands. Because that subdivision for her benefit (i.e. a selection of land) had not occurred prior to the IRA, it cannot occur now.

A decision not to allot land to [Appellant] would not be inconsistent with prior action taken by the Department with respect to allotments on the Flathead Reservation. First, as is evident from the letter to Senator Wheeler in 1942, the Department has interpreted the IRA to prohibit the allotment of land to those named in the 1933 Act who had not made a selection prior to the IRA. In addition, the Superintendent has informed you that all allotments issued since 1934 were for individuals who were listed on the approved schedule of allotments, dated February 11, 1922, long before the IRA was enacted. None of the information you have provided suggests that any allotments on the Flathead Reservation were both selected and issued after the IRA. In our opinion, therefore, a decision not to make allotments for any of the individuals listed in the 1933 Act would not be inconsistent with prior BIA action.

Finally, a decision not to allot land to [Appellant] is further supported by the apparent circumstance that "available tribal unallotted lands" do not exist at this time. Indeed, after the IRA, the Tribe quickly asserted control over all unallotted land. The original tribal constitution, adopted in 1935, provides that the unallotted lands of the Reservation "shall be held as tribal land, and . . . tribal lands shall not be allotted to individuals but may be assigned to members." Article VIII, Section 2. The original constitution included detailed provisions concerning assignments and stated that in making them, preference was to be

> given to landless heads of families. Article VIII, Sections 5-10. This suggests that the Tribe was aware of members who did not have assignments, and intended their needs to be met through assignments. Although the detailed provisions concerning assignments were deleted in 1960, the current constitution still provides that the Tribal Council may assign tribal lands. Article VIII, Section 1(1). As in 1942, therefore, it may be appropriate for [Appellant] to approach the Tribal Council for an assignment of land. [Footnote omitted.]

The record shows that the Senator Wheeler referred to in the 1996 Memorandum is Senator Burton K. Wheeler, who, at the time the IRA was passed, was the Chairman of the Senate Committee on Indian Affairs and co-sponsor of the IRA, which is also known as the Wheeler-Howard Act. The record discloses that the Department received two inquiries from Senator Wheeler on behalf of Daniel Lawrence Pablo, another individual named in the 1933 Act. The first inquiry was dated July 24, 1933. On July 29, 1933, the Assistant Commissioner informed the Senator that the Flathead Superintendent had been instructed to make the allotments required under the 1933 Act. The second inquiry from Senator Wheeler was dated April 28, 1942. In his May 6, 1942, response, referred to in the 1996 Memorandum, the Assistant Commissioner set forth the interpretation of the IRA which the Area Director followed in his February 2, 1996, decision in this appeal.

It is reasonable to believe that Senator Wheeler knew the intent of Congress in passing the IRA, and knew whether the Department's interpretation of the interaction between the 1933 Act and the IRA was consistent with that intent. The Supreme Court stated in Zemel v. Rusk, 381 U.S. 1, 11 (1965), that "[u]nder some circumstances, Congress' failure to repeal or revise in the face of [an] administrative interpretation has been held to constitute persuasive evidence that this interpretation is the one intended by Congress." See also Skokomish Indian Tribe v. Portland Area Director, 31 IBIA 156, 169 (1997), and cases cited therein.

The Board finds that, in 1942, the Department considered the same arguments Appellant makes here, and reached the same conclusion that the Area Director set out in his February 2, 1996, decision. The 1942 Departmental position was taken under precisely the same statutes and in regard to an individual identically situated to Appellant.

Appellant raises several arguments against the Area Director's February 2, 1996, decision, and by implication, the 1942 Departmental position. 2/ She first argues that the 1933 Act should be given a broad construction and should be liberally construed in her favor because it creates rights in favor of Indians. Although the Board agrees in general with Appellant's interpretation of the cases she cites, the IRA was also enacted to benefit Indians and is therefore subject to the same canons of construction as the 1933 Act.

2/ For purposes of this decision, the Board assumes that Appellant has not slept on her rights.

Appellant contends that reversing the Area Director's decision would not be contrary to the IRA because the IRA was intended to prevent loss of Indian lands to non-Indians and "[t]he policy of individual tribal members holding land was not deemed in any way a threat to the tribes under the new IRA protections." Opening Brief at 6. The policy of the IRA as to further allotment of tribal land is plainly and clearly stated in 25 U.S.C. § 461: "On and after June 18, 1934, no land of any Indian reservation * * * shall be allotted in severalty to any Indian." As stated by the Area Director at page 6 of his Answer Brief: "Further erosion of the tribal land base--even to a member--is in conflict with the goal of the IRA."

Appellant argues that 25 U.S.C. § 463(a) recognizes her right to an allotment on the reservation. This argument assumes that the 1933 Act gave Appellant a "right" to an allotment on the reservation prior to the selection of a particular tract of land. However, that argument is contrary to the position taken in the 1935 Solicitor's Opinion, and referred to in the 1996 Memorandum from the Solicitor's Office, which set forth the position that a right to an allotment attaches when a particular tract has been selected. I Op. Sol. on Indian Affairs 567, 55 Interior Dec. 295. Appellant has not attempted to show that this position is in error.

Citing the Meriam Report (Institute for Government Research, The Problem of Indian Administration (L. Meriam, ed., 1928)), Appellant argues that Congress could not have intended to remove her right to an allotment on the Flathead Reservation because it knew of the inadequacies of the allotment process in 1928, and still enacted the 1933 Act. Therefore, "Congress did not contemplate the [IRA] as an abrogation of the mandate to allot [her] pursuant to the 1933 Act." Opening Brief at 10.

The Meriam Report, and other contemporaneous studies of conditions on Indian reservations, led to a change in Indian policy which culminated in enactment of the IRA in 1934. See, e.g., Cohen's Handbook of Federal Indian Law (1982 ed.) at 144-49. The 1933 Act was enacted during a period when Indian policy was in transition. However, Appellant points to no evidence whatsoever that Congress specifically chose to exempt the beneficiaries of the 1933 Act from an anticipated change in allotment policy.

Appellant states that BIA does not believe the IRA prohibits further allotments because in 1995 the Area Director asked the Tribe "to provide him with additional information to determine if any 'loop hole' in the legislation would permit allotments on the reservation." Opening Brief at 10. It appears that Appellant is referring to an August 28, 1995, letter from the Area Director in response to an inquiry on her behalf from the Tribal Chairman. The August 28, 1995, letter states:

> We have made several requests to staff members of the Tribal Realty Office, which is under a compact agreement [apparently under the Tribal Self-Governance Project established in 25 U.S.C. §§ 458aa-458hh] with [BIA], to provide this office with information about the issuance of various allotments after the passage of the [IRA]. That Act, which was passed in 1934, stopped the issuance of new allotments. To date, the Tribal Realty Staff has not provided the requested information.

> Our research at the National Archives appears to indicate that [Appellant] and others did not receive their allotments because of the passage of the IRA. Our request for additional information from your staff is so that we can determine if there was any "loop hole" in the legislation which permitted the additional allotments on the reservation.

The Area Director's letter shows that he was requesting factual background information which was within the Tribe's custody pursuant to its compact so that he could determine why allotments were issued on the reservation after the passage of the IRA. That information, when finally obtained, revealed that the allotments in question had been selected before the passage of the IRA, as is discussed in the 1996 Memorandum from the Solicitor's Office.

Citing 25 U.S.C. §§ 334, 336, and 337 and implementing regulations in 43 C.F.R. Part 2530, Appellant argues that there are "several post-IRA statutes which allow tribal members to receive allotments." Opening Brief at 10. In fact, however, each of the three statutes cited predates the IRA: Section 334 was enacted on February 8, 1887, 24 Stat. 389, c. 119, § 4; section 336 was enacted on February 28, 1891, 26 Stat. 795, c. 383, § 4, and was amended on June 25, 1910, 36 Stat. 860, c. 431, § 17; and section 337 was enacted on June 25, 1910, 36 Stat. 863, c. 431, § 31. More importantly, the statutes and regulations deal with allotments from the public domain, not allotments on Indian reservations.

The remainder of Appellant's arguments allege that BIA violated its trust responsibility to her and a mandatory Congressional directive set forth in the 1933 Act. Appellant argues that the enactment of the IRA did not relieve BIA of its duties under the 1933 Act, and that BIA should have acted immediately to carry out those duties. She contends that she acquired "an equitable interest in her right to an allotment." Opening Brief at 14.

Appellant suggests that the Board could remedy the violations she alleges BIA committed by (1) ordering BIA to provide her with an allotment, presumably on the Flathead Reservation; (2) ordering BIA to seek special legislation for a public domain allotment for her; or (3) ordering BIA to pay monetary damages, plus interest. Appellant also notes that she could pursue "judicial enforcement of her allotment rights," Id. at 23, although she states that she should not have to do this because she should not be forced into court in opposition to her Tribe.

For the reasons discussed above, the Board concludes that Appellant has failed to show error in the Area Director's decision declining to allot her land on the Flathead Reservation. Therefore, assuming arguendo that it had the authority to issue such an order, the Board would not order BIA to allot tribal land Appellant on the Flathead Reservation.

Furthermore, the Board is not a court of general jurisdiction, and has only that authority which has been delegated to it by the Secretary. It has not been delegated authority to order the Department to seek special legislation. Nor has it been delegated authority to award money damages against

BIA. See, e.g., Toyon Wintu Center, Inc. v. Sacramento Area Director, 29 IBIA 290, 295 (1996); Estate of Clifford Celestine v. Acting Portland Area Director, 29 IBIA 269, 273 (1996), and cases cited therein. Therefore, the Board lacks authority to grant the relief Appellant seeks. 3/

As Appellant notes, she has the option of pursuing her claim in Federal court.

As an aside, the Board notes that, although the Tribe may support Appellant in her effort to obtain an allotment "or otherwise settle [her] claim[]," 4/ there is no evidence that the Tribe has ever responded to BIA's inquiries as to whether it would be willing to permit tribal land to be allotted to her, if it were determined that there was legal authority for BIA to do so. In addition, although Appellant objects to being placed in opposition to her tribe by being forced to pursue her claim in Federal court, her situation in that regard is not the result of any decision made by BIA. Instead, it is the result of the very legislation which Appellant seeks to enforce. Because it would remove land from the tribal land base, the allotment of tribal land to an individual tribal member of necessity places that individual in opposition to his/her tribe.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Portland Area Director's February 2, 1996, decision is affirmed. This decision is limited to the question before the Board, i.e., did the Area Director err in declining to allot Appellant land on the Flathead Reservation.

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Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge

3/ The Board notes that nothing in the materials before it appears to suggest that, before filing her Opening Brief in this appeal, Appellant sought any relief from BIA other than an allotment of tribal land on the Flathead Reservation.
4/ Letter of Aug. 14, 1995, from the Tribal Chairman to the Area Director.